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BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals

Application of R W. Docks & Slips to Dredge Material From the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin	Case No. 3-NW-84-0101
Application of R. W. Docks & Slips to Place Dock Structures on the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin	Case No 3-NW-95-04022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
ON REMAND FROM DANE COUNTY CIRCUIT COURT

In accordance with secs. 227 47 and 227.53(1)(c), Stats., the PARTIES to this proceeding were certified as follows:

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Procedural History

On August 15, 1996, the Division of Hearings and Appeals issued Findings of Fact, Conclusions of Law and an Order denying applications for a permit under sec. 30.12, Stats., to place dock structures on the bed of Lake Superior and for a contract to dredge materials near a proposed marina expansion project. On September 13, 1996, a Petition for Judicial Review was filed in Dane County Circuit Court. On May 29, 1997, the Dane County Circuit Court (the Circuit Court) issued a Decision and Order holding that "the decisions . . . denying R. W. Docks a structure permit and a contract to dredge, are supported by substantial evidence." However, the Circuit Court held that ". . . the Administrative Law Judge failed to make any findings regarding estoppel. Therefore, this case is remanded to the Administrative Law Judge for the narrow purpose of making findings on the issue of estoppel." (Circuit Court Order, p. 19)

By its very nature "equitable estoppel" involves powers of "equity" not normally held by administrative agencies. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v State Board of Health, 245 Wis 440 (1944). Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it. Kimberly-Clark Corp v. PSC, 110 Wis. 2d 455, 462, 329 N.W.2d 143, 146 (1983). The Division does not claim for itself any "equitable" powers beyond the specific statutory authority to decide if the permit and contract applications met existing statutory standards. However, given the Remand Order of the Circuit Court, the ALJ will make Findings on the equitable issues which the Circuit Court, but not the ALJ, has authority to execute.

On July 10, 1997, a telephone conference call was conducted and all parties agreed that the narrow issue of equitable estoppel be decided on the basis of existing briefs previously submitted to the Division. On August 29, 1997, the Division gained possession of said briefs. This Decision is not based upon any briefs submitted to the Circuit Court.

FINDINGS OF FACT

1. This Decision incorporates by reference the Findings of Fact, Conclusions of Law and Order dated August 15, 1996

2. There is no evidence in the record of any action or inaction by the DNR which induced reliance by R. W. Docks or its predecessor corporation to its detriment

3. With respect to equitable estoppel, R. W Docks argued *in toto* as follows in its "Memorandum in Support of Applications."

> In 1968, R. W Docks & Slips applied for a permit to construct a breakwater for the purpose of creating a sheltered harbor including the proposed dredging area. It expended the money to construct this breakwater in reliance on the permit. In 1972, after prolonged negotiations with the department, R. W. Docks entered a settlement with the Department over a dispute as to the location of the shore of the lake. The settlement required the Department to issue a permit for the construction of a structure on the bed of Lake Superior. The structure, commonly referred to as the quay, is the anchor for Docks 4 and 5 which will occupy the dredging area R. W. Docks would not have entered this settlement agreement if it knew that the Department would seek to prohibit it from completing these docks. Thus, all of the factors required for estoppel are clearly present, under these circumstances it would be inequitable for the Department to be allowed to prevent R. W Docks from completing the marina." (2/13/96, Brief of R. W. Docks, p. 10)

4. The original enforcement actions and permits dealt with the area where Docks 1, 2 & 3 are located and the placement of the "quay" and dredging of the lagoon. Thus, only documents in the record are the permits for the dredging and placement of the "quay", for the dredging of the PSMA lagoon and the area where Docks 1, 2 & 3 are located. See Exhibit 1-7 and the "Plates" presented with that 1972 application. The record is clear that the permission granted to the applicant and its predecessors in the late 1960's and early 1970's were limited to discrete activities and had specific expiration dates.

In 1983, the applicant approached the Department with the current proposal to dredge 15,000 cubic yards of material from the current proposed project area to place docks 4 & 5. The Department quickly notified the applicants of its objections to the proposal and has since consistently maintained that position.

5. There is no specific language cited in the record which granted the applicants a prospective, unwritten permit to place structures on the bed of Lake Superior for boat slips sufficient to moor 272 boat slips. Indeed, even if the applicants had obtained a written permit authorizing construction of slips accomodating 272 boats, which they have not, the permit would have been void if it were not completed within the time period specified in the permit or within three years if no time period were specified. (Sec. 30.07, Stats.) The eleven year period between

the 1972 settlement and the 1983 applications is longer than either the statutory expiration date or the two year period found in the other permits issued to the applicants and its successors

6. There was no evidence of anything approaching "fraud" by the DNR The applicant asserted that it was somehow "inequitable" for the Department to settle an enforcement action against the applicants for removing materials from the bed of Lake Superior and then not later grant the applicants a permit, over a decade later, for boat mooring slips. This argument is absurd and is likely "frivolous" within the meaning of sec. 814.025(3)(b), Stats.

7. In this matter a clear preponderance of the evidence indicated that the proposed dredging and construction would result in the destruction of an important and to large extent unique bed of aquatic vegetation on the south shore of Lake Superior.

Even if the three elements of estoppel and the further element of "inequitable" fraud by the government agency were proven, the public interest in protecting this natural resource would likely outweigh any injustice to the applicant. However, because the applicants have not developed any alleged "fraud" nor specifically shown any action or inaction of the DNR which induced reliance by R. W. Docks to their detriment, it is difficult to speculate as to the nature of the alleged injustice is which would need to be balanced against the public benefit of maintaining a rare environmental resource.

DISCUSSION

The relationship between the 1972 settlement with respect to the location of the shoreline and the instant permit applications is not developed in the Applicant's brief nor in the record. The general rule in Wisconsin is that it is not necessary to rule on issues which are not adequately developed by the party in the record or in briefs. See: Truttschel v. Martin, 208 Wis. 2d 361, 369, 560 N W.2d 315 (Wis. Ct. App. 1997) However, in this instance the ALJ has been Ordered by the Circuit Court to develop the applicant's arguments for them.

The best statement of the equitable estoppel argument is found in the 1987 Dane County Circuit Court decision. In the October 1, 1987, Dane County Circuit Court decision (the 1987 Circuit Court decision) R. W. Docks asserted that " . . . when (the) DNR granted the permit to construct the breakwater in 1972 it was with . . . full knowledge that the marina would be constructed with a total of 272 boatslips." (The 1987 Circuit Court decision, p. 12) In the 1987 Circuit Court action, R. W. Docks further alleged financial loss which it attributed to the DNR " . . . allowing it '. . . to detrimentally rely on the initial breakwater permit.'" (The 1987 Circuit court case, quoting the petitioner's memorandum)

This argument is missing several important linkages, none of which were developed in the record. First, under sec. 30.12, Stats., a permit is required for each structure on the bed of a navigable waterway which does not meet express statutory exemptions. The breakwater was evaluated pursuant to the statutory standards and a permit to construct the breakwater was issued on March 10, 1971. (Ex. 1, #3) At that time, another proposed breakwater structure was rejected because it would " . . . constitute an extension across adjacent riparian property." (Id.) It

should have been apparent to the applicants that all structures would be evaluated individually on the basis of whether or not they met the statutory standards. Further, the permit specified that it applied only to the specific structures included in " . . . breakwater plan #2 and the two boat launching ramps as described in the foregoing findings of fact." (Id., p. 4) Finally, the breakwater and boat ramp permit was limited on its face to a period of ". . . two years from the date hereof, if (the) structures are not completed before such date." (Id.)

Similar language appears in the 1972 permit to place the solid pile quay structure on the bed of the lake. That permit included the following language " . . . the authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest." (Ex. 1, # 4) In the instant applications, the ALJ found that placement of the pier structure and the proposed dredging in an environmentally sensitive area would be detrimental to the public interest in navigable waters

R. W. Docks asserts that the breakwater permits and the 1972 settlement which led to the "quay" structure permit, somehow indefinitely granted it rights in perpetuity to build other structures, not specifically and individually evaluated in terms of the statutory standards, on the bed of Lake Superior. However, any such "reliance" by R. W. Docks was unreasonable. The testimony in the record indicates that Port Industries, Inc. . . . "got into economic problems in '72, '73, '74 and '75 and actually lost the marina as Port Industries in '76." (TR, p. 125) R. W. Docks assumed ownership in October, 1977. Mr. Robert F. Holmgren was the principal manager in both Port Industries, Inc., and R. W. Docks and Slips. A bank failure and other events kept Holmgren from pursuing completion of the project as he had hoped during this time period. (Id.) There is no evidence in the record indicating that the Department promised either Port Industries or R. W. Docks the right to place any number of pier slips at the marina. The Department would not have had authority to make such a promise without first pursuing the public noticing requirements of sec. 30 02, Stats. As with prior applications, the rights of the public and of neighboring riparians had to be considered in processing any future permit applications.

Any "reliance" to its detriment by the applicants was misplaced and "unreasonable" as a matter of law because its predecessor corporation had direct and first-hand knowledge of the DNR's permit evaluation procedure· 1) that all structures would be evaluated individually; 2) that all permits granted were limited by specific time periods.

Pursuant to statute, the DNR serves as " . . . the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Sec. 281.11, Stats. Pursuant to Chapter 30, Stats., the Department must evaluate discreet activities that require permits to ensure that proposed activities do not have a detrimental impact or public rights in public waters under existing environmental conditions. All of the prior permits, contracts and settlements granted to the applicants had no bearing on the likelihood of the grant or denial of the instant applications.

CONCLUSIONS OF LAW

1. An administrative agency is not a court of equity and possesses only such powers as are expressly granted to it or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co v. State Board of Health, 245 Wis. 2d 440 (1944). The Division does not have authority to fashion equitable remedies and makes Findings and Conclusions in this instance by way of an extension of the equitable powers of the Dane County Circuit Court.

2. The three elements of equitable estoppel are as follows:

(1) Action *or nonaction* which induces (2) reliance by another (3) to his detriment.

In addition, the proof of estoppel must be clear and convincing and may not rest on conjecture. The Wisconsin Supreme Court has held that in order to estop the government, the government's conduct must be of such a character as to amount to fraud. The word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

> "The term 'fraud' used by the court is not to be construed here as it is used in the ordinary sense—as an artifice, a malevolent act, or a deceitful practice.
>
> " 'The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable."'

State v City of Green Bay, 96 Wis. 26 195, 202, 291 N.W.2d 508 (1980).

The applicants have not shown any of the elements of equitable estoppel by clear and convincing evidence.

Further, even if the three elements of estoppel are proved, in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied. Id., p. 210

No "injustice" was demonstrated by the applicant. The public interest in maintaining a rare environmental resource would be given strong weight in any balancing of the unproven injustice and the public interest

ORDER

WHEREFORE, the Division submits these Findings and Conclusions on the equitable estoppel issue which it was directed to consider on Remand from the Dane County Circuit Court.

Dated at Madison, Wisconsin on September 12, 1997

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By: _____
Jeffrey D Boldt
Administrative Law Judge

ORDERS\RWDOCK.LAM

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats , and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227 52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.